IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

APPLETON PAPERS INC. and NCR CORPORATION, Plaintiffs, v. GEORGE A. WHITING PAPER COMPANY, P.H. GLATFELTER COMPANY, MENASHA CORPORATION, GREEN BAY PACKAGING INC., INTERNATIONAL PAPER COMPANY, LEICHT TRANSFER & STORAGE COMPANY, NEENAH FOUNDRY COMPANY, NEWPAGE WISCONSIN SYSTEM INC., THE PROCTER & GAMBLE PAPER PRODUCTS, and WISCONSIN PUBLIC SERVICE CORP. CITY OF APPLETON, CITY OF DE PERE, CITY OF GREEN BAY, CITY OF KAUKAUNA, BROWN COUNTY, GREEN BAY METROPOLITAN SEWERAGE DISTRICT, HEART OF THE VALLEY METROPOLITAN SEWERAGE DISTRICT, NEENAH-MENASHA SEWERAGE COMMISSION, VILLAGE OF KIMBERLY, VILLAGE OF WRIGHTSTOWN, WTM I COMPANY, and U.S. PAPER MILLS CORPORATION, Defendants.	:	No. 2:08-cv-00016-WCG

MEMORANDUM OF DEFENDANT P.H. GLATFELTER COMPANY IN RESPONSE TO UNITED STATES' BRIEF AS *AMICUS CURIAE*

In an order dated June 3, 2008 (Dkt. No. 145), the Court granted the United States' request to file a brief as *amicus curiae* addressing issues raised by motions to dismiss

certain claims in plaintiffs' complaint ("United States' Brief") (Dkt. No. 132) and invited all parties to respond to the United States' Brief within twenty-one days. Defendant P.H. Glatfelter Company ("Glatfelter") writes solely in response to the United States' comments about Glatfelter's motion to dismiss the declaratory judgment claim in Count III of what is now the Fifth Amended Complaint. The United States and Glatfelter agree that Count III should be dismissed. However, the United States disagrees with Glatfelter's offered rationale.

The United States has over-read Glatfelter's argument. The facts pleaded in plaintiffs' complaint[1] could not support issuance of a declaration of liability under section 113(f) of CERCLA that would resolve anything more than would the doctrines of issue preclusion and claim preclusion. Issues will be resolved here. They may or may not come up again. But this case is not postured so that the Court can decide on allocation of all costs for all time under all circumstances.

Glatfelter moved to dismiss Plaintiffs NCR Corporation's ("NCR") and Appleton Papers Inc.'s ("API") claims in (i) all portions of Counts I and II of the complaint seeking to recover from Glatfelter "OU1 Response Activities and Costs" as defined in the consent decree entered in *United States v. P.H. Glatfelter Co.*, No. 2:03-cv-949-LA, (ii) all portions of Count I of the complaint seeking to recover natural resource damages, and (iii) Count III of the complaint

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[1] Plaintiffs filed an initial complaint and then have amended that complaint on five separate occasions, each time to join additional defendants and not to add new claims. The complaints -- the latest of which, the Fifth Amended Complaint, was filed on June 12, 2008 -- each allege a claim for cost recovery under section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a) (Count I), a claim for contribution under section 113(f) of CERCLA, 42 U.S.C. § 9613(f) (Count II), and a claim for declaratory judgment under section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2) and the Declaratory Judgments Act, 28 U.S.C. § 2201 (Count III). For purposes of this brief, any reference to "complaint" refers to each of these complaints.

in its entirety. The United States supports dismissal of Count I in its entirety and that portion of Count II that seeks contribution from Glatfelter for "OU1 Response Costs and Activities." The United States also takes the position that because plaintiffs cannot assert a claim under CERCLA § 107(a), plaintiffs may not obtain declaratory relief on that issue. *See* United States' Brief at 39 ("declaratory relief under CERCLA § 113(g) is available in . . . (2) any private action under § 107(a)(4)(B) that is consistent with the limitations imposed by CERCLA and Atlantic Research").

Nonetheless, the United States goes out of its way to address Glatfelter's argument that plaintiffs NCR Corporation ("NCR") and Appleton Papers Inc. ("API") have not stated a valid claim for declaratory judgment in part because they do not bring the "initial action" under section 107(a). The United States worries that Glatfelter's position would lead to "wasteful re-litigation of issues." United States' Brief at 38.

The United States' concern is misplaced. Neither Glatfelter nor any other party suggests that issue and claim preclusion would not attach to any judgment in the present action. These doctrines guard against re-litigating issues decided here, offering the protection the United States wishes to preserve.

Plaintiffs seek a declaratory judgment fixing allocation of future response costs and natural resource damages among the parties, without pleading what the future costs and damages may be and when they may be incurred, and without pleading any obligation or commitment on their part to incur those expenditures. Moreover, plaintiffs seek an *allocation* of future costs and damages based upon equitable factors, but their complaint does not plead facts sufficient for the Court to have any reasonable belief that the equitable factors that may apply to any consideration of any *past* costs plaintiffs already have incurred would have any relevance for

allocation of what presently are unknown *future* costs that plaintiffs have not actually incurred and are not committed to incur. Indeed, no party can say with any degree of confidence what costs and damages will be incurred, by whom, or when. Thus, as Glatfelter has highlighted previously, any declaratory judgment on allocation of future costs would be wholly premature and improper under CERCLA and the Declaratory Judgment Act. *See* Memorandum in Support of Defendant P.H. Glatfelter Company's Motion to Dismiss (Dkt. No. 58) ("Glatfelter's Memorandum") at 10-12; Reply Memorandum of Defendant P.H. Glatfelter Company in Support of its Motion to Dismiss (Dkt. No. 120) ("Glatfelter's Reply Memorandum") at 1-3, 6-8.

Nothing in the United States' position alters the reality in this case. Plaintiffs have not alleged facts from which a Court could conclude that an actual controversy of "sufficient immediacy and reality" exists among the parties. Their allegations stem from a unilateral administrative order ("UAO") issued by United States Environmental Protection Agency and directed to plaintiffs, Glatfelter, Menasha Corporation, WTM I Company, U.S. Paper Mills Corporation, and two other entities not parties to this proceeding, imposing joint and several obligations for a certain geographic region of the Lower Fox River. To date, the parties named in the UAO have not resolved how they will manage responsibility for complying with its terms. Indeed, plaintiffs have not alleged that they will comply with the UAO. Plaintiffs have not alleged that the UAO has been enforced, or that plaintiffs otherwise are in fact committed to incur future costs and damages. Rather, Plaintiffs simply allege that they "expect that they will be required to pay considerably more than they have paid to date in order to comply with the [UAO]." Fifth Amended Complaint ¶ 63. Their factual allegations do not "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Their statement that "an actual, substantial, and legal controversy has arisen" as to allocation that

"is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment," Fifth Amended Complaint ¶ 191, is the type of "formulaic recitation of the elements of a cause of action" that is insufficient to maintain a cause of action. *Bell Atlantic Corp.*, 127 S. Ct. at 1965; *see also Equal Employment Opportunity Comm'n v. Concentra Health Servs., Inc.*, 496 F.3d 773, 777 (7th Cir. 2007).

Even if Plaintiffs had alleged that they had pre-paid or had committed to pay future costs in excess of their allocable shares, they have not alleged conditions to suggest that the equitable factors that might be relevant for allocating costs and damages already incurred by the parties would be appropriate for allocating yet unknown future costs. As a result, the Court can have little confidence that the issues actually litigated in this proceeding will be the same issues relevant to allocating equitably any future costs. Any declaratory judgment would necessitate a "contingency clause" allowing the parties to re-litigate allocation issues as new evidence emerges during any future response action in which the parties incur costs. *See Beazer East, Inc. v. Mead Corp.*, 412 F.3d 429, 449 (3d Cir. 2005). This contingency entirely defeats any purpose that a declaratory judgment would serve. Issue and claim preclusion sufficiently protect against unnecessary re-litigation in any future proceedings.

The United States goes to great lengths to comment on when a declaratory judgment may be authorized under section 107(a) of CERCLA. Nevertheless, the United States confirms that plaintiffs do not state a valid claim for cost recovery under CERCLA section 107(a). And for the reasons set forth above and in Glatfelter's Memorandum and Glatfelter's Reply Memorandum, Plaintiffs do not have a valid claim for declaratory judgment under section 113 of CERCLA or the Declaratory Judgment Act. Thus, in the end the point is clear: plaintiffs have not pleaded a valid claim for a declaratory judgment and Count III should be dismissed.

Respectfully submitted,

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Dated: June 24, 2008

CERTIFICATE OF SERVICE

I hereby certify that, on this 24th day of June, 2008, a true and correct copy of the foregoing Memorandum of Defendant P.H. Glatfelter Company in Response to United States' Brief as *Amicus Curiae* was filed electronically via the Electronic Court Filing system and is available for viewing and downloading by the following:

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